85-440

Supreme Court, U.S.
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No. 85-

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985
Philadelphia Electric Company
Intervenors-Petitioner,
vs.
Exxon Corporation,
Defendant-Respondent,
and
United States of America,
Plaintiff-Respondent.

INTERVENOR PHILADELPHIA ELECTRIC COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a public utility which was directly injured by an oil producers overcharges is entitled to a hearing, to present evidence, or to be heard in any other manner in regard to the distribution of restitution funds ordered by a District Court to be paid by that producer.

2. Whether the District Court violated Petitioner's Fifth Amendment due process right by taking restitution funds in which Petitioner had a claim without just compensation.

3. Whether the District Court violated its equitable and statutory duties to ascertain the victims of a crude oil overcharge and to restore them to the position they would have occupied but for the illegal conduct by ordering that the restitution funds be distributed to the State governments for use in programs designed to aid a small segment of the population.

PARTIES TO THE PROCEEDINGS

The following is the list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b).

THE UNITED STATES OF AMERICA,

THE STATE OF ALABAMA,

THE STATE OF ARKANSAS,

THE STATE OF CALIFORNIA,

THE STATE OF CONNECTICUT,

THE STATE OF DELAWARE,

THE STATE OF IDAHO,

THE STATE OF ILLINOIS,

THE STATE OF INDIANA,

THE STATE OF IOWA,

THE STATE OF IOWA,

THE STATE OF HAWAII,

THE STATE OF KANSAS,

THE STATE OF LOUISIANA,

THE STATE OF MARYLAND,

THE STATE OF MICHIGAN,

THE STATE OF MISSISSIPPI,

THE STATE OF MONTANA,

THE STATE OF NEVADA,

THE STATE OF NORTH DAKOTA,

THE STATE OF OHIO,

THE STATE OF OREGON,

THE COMMONWEALTH OF PENNSYLVANIA,

THE STATE OF RHODE ISLAND,

THE STATE OF TEXAS,

THE STATE OF VERMONT,

THE STATE OF WEST VIRGINIA,

THE STATE OF WISCONSIN,

THE STATE OF WYOMING,

THE TERRITORY OF GUAM,

THE TERRITORY OF THE VIRGIN ISLANDS,

EXXON CORPORATION,

NATIONAL OIL JOBBERS COUNCIL and the JOBBERS GROUP,

GLADIEUX REFINERY, INC.,

U.S. OIL AND REFINING COMPANY,

THE INDICATED REFINERS:

Champlin Petroleum Company, Ashland Oil, Inc., Tenneco Oil Company, American Independent Refiners Association, Pennzoil Company, and Texas City Refining, Inc.,

THE INDEPENDENT GASOLINE RETAILERS:

Luther Griffin, t/a Palmer Highway Exxon,
Edward McGovern, t/a Maple Avenue Exxon,
Anthony Monaco, t/a Milltown Exxon Service-center, Inc.,
Donald E. Skilling, t/a Edon Service Corp.,
Tex Shipley, t/a Shipley's Standard Service,

TOSCO CORPORATION,

PHILADELPHIA ELECTRIC COMPANY,

AIR TRANSPORT ASSOCIATION OF AMERICA,

GERALDINE H. SWEENEY,

NATIONAL FREIGHT, INC.,

RJG CAB INC.,

MARATHON PETROLEUM COMPANY,

MURPHY OIL CORPORATION,

MOBIL OIL CORPORATION.

There are no parent companies or subsidiaries of Philadelphia Electric Company.

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No. 85-

IN THE

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October Term, 1985

UNITED STATES OF AMERICA,

Plaintiff

v.

EXXON CORPORATION,

Defendant

INTERVENOR PHILADELPHIA ELECTRIC COMPANY'S PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Philadelphia Electric Company ("PECO") hereby petitions for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States, certiorari to be limited to the issue of the proper distribution of the overcharges for which Exxon Corporation ("Exxon") was held liable and the procedures followed in connection with such distribution.

OPINIONS BELOW

The Opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") is not officially reported. It appears at 4 Energy Mgmt. (CCH) ¶26,539. It is set forth in full as is the dissent of Judge Becker in the Appendix submitted with the Petition for Writ of Certiorari filed by the National Oil Jobbers' Counsel, *et al.* in the instant proceeding ("NOJC App.") as App. A, at A-1, *et seq.* The Opinion and Order of the United States District Court for the District of Columbia in *United States v. Exxon Corp.*, is reported at 561 F. Supp. 816 (D.D.C. 1983); and appears at NOJC App., as App. C at A-191.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on July 1, 1985. A timely Petition for Rehearing was denied on August 15, 1985. (NOJC App. B at A-187). This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 as amended by the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, 85 Stat. 743, 748 (previously codified at 12 U.S.C. §1904 Note (1976)), as incorporated by Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627, 633.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fifth Amendment:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Section 209, the Economic Stabilization Act of 1970 as amended (previously codified at 12 U.S.C. §1904 Note (1976)):

> "Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation."

STATEMENT OF THE CASE

This case involves the disposition by the District Court of approximately $2 billion in restitution funds pursuant to a judgment under Section 209 of the Economic Stabilization Act, 12 U.S.C. §1904 Note (1976). Although the District Court permitted Petitioner Philadelphia Electric Company to intervene as of right under Rule 24(a) of the Federal Rules of Civil Procedure, it did not provide PECO or any of the other purchaser-intervenors[1] who were the victims of the overcharge, any

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1. In addition to Philadelphia Electric Company, numerous other purchasers of oil and oil products were permitted to intervene under Federal Rule of Civil Procedure 24(a), including truck operators, taxicab operators, gasoline retailers, oil jobbers, airlines and oil refiners. *See* NOJC App. at 290 *et seq.*. PECO understands that

opportunity to present evidence or to be heard on the merits of their claim to a portion of the restitution fund.

Instead, without hearing a scintilla of evidence from the injured purchasers on the remedial issues, the district court *sua sponte* determined that the entire overcharge fund should be paid to the United States Treasury and distributed to the State governments for use in five programs designed primarily to aid recipients of aid for families with dependent children and food stamps. The district court's diversion of these restitution funds from the overcharged purchasers to a small segment of the population was a violation of PECO's Fifth Amendment due process rights and a violation of the court's equitable and statutory duties. *See* 12 U.S.C. §1904 Note (1976).

This action was commenced by the Department of Energy against Exxon for violation of crude oil regulations in connection with Exxon's massive miscertification over a six year period of lower priced "old oil" as higher priced "new oil" from its "Hawkins Field" Unit. On cross motions for summary judgment, the District Court held that Exxon had violated the regulations and was liable for the overcharges plus interest in the amount of $1,635,604,638.10. Exxon has filed a motion with this Court requesting leave to file a Petition for a Writ of Certiorari not to exceed forty five pages. PECO does not seek review of the liability portion of the Court's judgment.

In its Motion to Intervene, its Notice of Appeal, its brief in TECA and its Petition for Rehearing in TECA, PECO urged that it be provided an opportunity to be heard on its claim that as a direct purchaser of oil from refiners it was injured by Exxon's unlawful overcharges.

NOTES *(Continued)*

Petitions for a Writ of Certiorari are being filed by the intervenor refiners, jointly by the oil jobbers, gasoline retailers and airlines and jointly by the truck and taxicab operators and motorists.

On at least three separate occasions, parties sought to address the "remedy" issue (the disposition of any amount ordered to be refunded by Exxon) in the District Court. Each time, the District Court expressly "deferred" consideration of the remedial issues. For example, when various independent refiners sought to intervene, claiming they were injured by Exxon's overcharges, Exxon filed a Motion for a Stay which the District Court granted holding that "[t]here shall be no filing of briefs *amicus curiae* or responses thereto by the potential intervenors or the parties, respectively, *concerning remedial issues* until further order of this Court." Order, December 15, 1982 (emphasis added), NOJC App. D at A-288. Later, in January 1983, when the Independent Gasoline Retailers moved to intervene to assert a claim to their portion of the overcharge fund and Exxon again moved to stay any briefing on the remedial issue, the Court granted Exxon's Motion and deferred hearing the remedial issue.

On March 25, 1983, while all the potential intervenors were awaiting their opportunity to present their claims, the District Court declared Exxon liable for the overcharges *and* decided the remedy issue thereby denying those who were injured all right to be heard and to present evidence. The method of distribution selected by the Court—payment to the States for use in five limited programs—was not proposed by any party to the case. Thereafter, and prior to entering final judgment, the District Court permitted purchasers of oil to intervene finding "that the applicants for intervention are entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2)." Order, April 29, 1983, NOJC App. D at A-291.

Although recognizing that the intervenor-purchasers had claims to a portion of the fund "as a matter of right" the District Court refused to permit any hearing on the remedial issue. The District Court adopted a distribution plan which provides that the overcharge be distributed in accordance with five federal programs under which Congress appropriated $200 million to the States.

Section 155 of The Continuing Appropriation Act of 1982, Pub. L. No. 97-377, 96 Stat. 1830 (1982) commonly known as the "Warner Amendment." These programs provide for:

> (a) Low income home energy assistance, *i.e.*, grants to the poor to assist in the payment of home heating and utility bills; 42 U.S.C. §8621;
>
> (b) grants by the States for "weatherization of dwelling units . . . occupied by low income families", 42 U.S.C. §6863(a);
>
> (c) state development of conservation plans, 42 U.S.C. §6321;
>
> (d) funding for planning and implementing energy conservation measures for schools and hospitals, 42 U.S.C. §6371; and
>
> (e) funding of State educational services regarding conservation activities 42 U.S.C., §7001

On appeal, a divided panel of the Temporary Emergency Court of Appeals affirmed the District Court's remedy decisions on July 1, 1985. Judge William H. Becker's eighty-one page dissent was devoted exclusively to the issue of the proper distribution of the restitution fund and procedures to be followed in connection therewith. Timely petitions for rehearing were denied on August 15, 1985. (NOJC App. B at A-187).

ARGUMENT

The Writ of Certiorari should be granted in this case to prevent the denial of PECO's right to a hearing, and thus to due process, under the Fifth Amendment, to correct serious errors of law which, because of the importance of this case, will be of precedential significance in scores of cases, to resolve the conflicting decisions of the Temporary Emergency Court of Appeals concerning the

government's duties in connection with restitution funds under Section 209 of the Economic Stabilization Act, 42 U.S.C. §1904 Note (1976), to resolve the conflicting decisions between different Courts of Appeals concerning the disposition of restitution funds, and, finally, and perhaps most importantly, to permit this Court to correct the District Court's serious departure from "the accepted and usual course of judicial proceedings." Sup. Ct. R. 17.1(a).

The proper distribution of restitution funds, and the procedures to be employed in connection therewith, are vital questions involving not less than 5.5 billion dollars in this and other pending crude oil overcharge proceedings.[2] These issues have arisen, and will arise, with regularity in a variety of cases.[3]

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2. This case involves nearly $2 billion in overcharges. The *DOE/Stripper Well Exemption Litigation*, MDL 378 (D. Kan.) involves another $1 billion in crude oil overcharges. Pending in the Office of Hearings and Appeals of the Department of Energy are proceedings involving another $3 billion. *See, e.g., In re Adams Resources and Energy, Inc., et al.*, 9 DOE ¶82,553 (1982); *In re Standard Oil Co. (Amoco)*, 10 DOE ¶85,048 (1982); *In re Alfred B. Alkek, et al.*, 9 DOE ¶82,521 (1982); *In re ERA/Getty Oil Co.*, Case No. HRR-0074; *In re Cities Service Oil and Gas Corp.*, Case No. HRO-0285; *In re Remedial Order to Texaco, Inc.*, Case No. DRO-0199. Various crude oil cases are pending in the federal courts involving several hundred millions of dollars. *See, e.g., Department of Energy v. Hunt, et al.*, 734 F.2d 816 (TECA 1984); *United States v. Sutton, et al., appeal pending* Nos. 10-57, 10-58 (TECA); *Diamond Shamrock Refining Co. v. Standard Oil Co., et al.*, No. CS-84-1432 (S.D. Ohio); *United States v. Getty Oil Co.*, No. 77-434 (D. Del.). The issue of the proper disposition of these funds will have a profound economic affect on oil burning utilities, refiners, oil jobbers, truck operators, governmental units and others.

3. The right of overcharged purchasers to restitution, and the procedural rights attendant thereto, are vital issues in a broad spectrum of cases in addition to the many crude oil overcharge cases cited above. For example, these issues arise in rate cases, *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970) *cert. denied*, 402 U.S. 999 (1971) (restitution ordered to injured rate payers); and in class action antitrust and securities cases

The decision of the Court below is being cited as controlling in other proceedings by those who would prevent injured purchasers of oil from presenting their claims for compensation and divert restitutionary funds to state or federal governments for expenditures which bear no relationship to the injuries caused by the overcharges.

A. This Court Should Grant The Petition For A Writ Of Certiorari To Prevent The Denial Of PECO's Constitutional Rights.

As concisely stated by Judge William H. Becker in his detailed dissent in the instant case, "[t]he right to recover monetary and other damages caused by a violation of law . . . is a property right protected by the Due Process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States." NOJC App. at A-130.

Indeed, this Court held, as recently as 1982, that the right to seek monetary relief in the courts, similar to the restitutionary claims of PECO in this case, is a property right entitled to the protections afforded under the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-29 (1982). *Accord, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

PECO purchased significant quantities of oil subject to the overcharges by Exxon. PECO was permitted to intervene in these proceedings as a matter of right under

NOTES *(Continued)*

payers); and in class action antitrust and securities cases where settlement funds are not exhausted by an initial distribution, *In re Folding Carton Antitrust Litigation*, 1984-2 Trade Cas. ¶66,189 (7th Cir. 1984) (Court ordered fund paid to United States Treasury and permitted injured class members to file claims); *Van Gemert v. Boeing Co.*, 739 F.2d 730 (2d Cir. 1984). (Unclaimed portion of fund returned to the defendant after proceedings before a Special Master).

Fed. R. Civ. P. 24(a) in order to assert its direct and substantial claim to a portion of the overcharge fund. Yet, the District Court denied PECO its Constitutional right to be heard when it *sua sponte* diverted all of the restitution fund to the States for use in the programs designed primarily to aid the indigent. The District Court took this action despite its finding that consumers of oil such as PECO were, in all likelihood, the victims of the overcharge. NOJC App. at A-267-68.

Longstanding precedent of this Court requires that PECO be afforded a "meaningful" hearing before its restitutionary rights can be extinguished. *See, Matthews v. Eldridge*, 424 U.S. 319 (1976); *Armstrong v. Manzo*, 380 U.S. 545 (1965). Here, PECO has not been afforded *any* hearing, much less one that could be characterized as "meaningful". PECO was never permitted to present evidence, or present its legal arguments, in support of its claim that, as an overcharged consumer, it was entitled to restitution.

In addition, the District Court's judgment constitutes a taking of PECO's property without just compensation The District Court held that the injury from the Exxon overcharges was borne by PECO and similarly situated "consumers" of petroleum. *See*, NOJC App. at A-267-68. However, the Court, in an ad hoc usurpation of the legislative function, redistributed the entire fund from those who were overcharged to a small segment of the population. The Court's action constituted an unlawful taking without just compensation in violation of the Fifth Amendment to the United States Constitution. *See, Blanchette v. Connecticut General Ins. Co.*, 419 U.S. 102, 122 (1974); *Dames & Moore v. Regan*, 453 U.S. 654, 689-90 (1981).

PECO, and the other intervenor-purchasers including the refiners, retailers, airlines, truck operators, and motorists, were deprived of their most fundamental Constitutional right to a hearing by the District Court. Unless corrected, the decisions of the Courts below will

support a similar denial of the right to be heard in all pending crude oil overcharge, and other restitution cases. *See, e.g., Department of Energy v. Hunt, et. al., supra.* This Court is respectfully requested to grant the Writ in order that PECO may have an opportunity to be heard.

B. The Courts Below Committed Errors of Law by Failing to Carry Out Their Restitutionary Duties Which Should Be Corrected By This Court.

The decisions of this Court and the prior decisions of the Temporary Emergency Court of Appeals unquestionably imposed a duty upon the District Court to order restitution to injured purchasers such as PECO. *See, e.g., Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Federal Power Comm'n. v. Interstate Natural Gas Co.*, 336 U.S. 577, 582 (1949); *Citronelle-Mobile Gathering, Inc. v. Edwards*, 669 F.2d 717 (TECA) *cert. denied*, 459 U.S. 877 (1982). This duty includes an obligation to attempt to ascertain the victims of the overcharges by holding an evidentiary hearing if necessary. *In re DOE/Stripper Well Exemption Litigation*, 578 F.Supp. 586, 595 (D. Kan. 1983). And, as this Court held in *Interstate Natural Gas, supra*, the duty to make restitution "plainly cannot be discharged by payment of the fund to those who show no loss. . ." 336 U.S. at 582. Here, the District Court violated these well established principles in several regards. First, it failed to hold any hearings on the remedial issue or make any effort to ascertain the victims of the overcharges. Second, after concluding that consumers of oil (such as PECO) were harmed, it diverted the fund to a small segment of the population and to the exclusion of PECO by directing payment to the states for use in five programs.

However meritorious these programs may be, the District Court had no right to redistribute restitutonary funds belonging to overcharged purchasers for use in

them. If such income redistribution is to occur, it is for Congress, not the courts, to authorize.

The District Court's judgment was contrary to law and should be overruled by this Court. *See State of Tennessee v. Dole*, 749 F.2d 331, 337 (6th Cir. 1984).

C. The Majority Decision In The Court Below Is In Conflict With Other TECA Decisions On The Same Issue. These Conflicting Decisions Should Be Resolved by This Court.

Rule 17.1(a) of this Court provides that cases presenting conflicting decisions by different Courts of Appeals are appropriate for consideration by this Court. All cases arising under the Economic Stabilization Act are heard by the Temporary Emergency Court of Appeals preventing development of alternative reasoning in different Courts of Appeals. Different panels of that Court play the role of independent Courts of Appeals. A conflict does exist within TECA, and TECA has declined to resolve the conflict by denying the petitions of PECO and others for rehearing en banc. Accordingly, this Court should resolve the conflict.

In *Citronelle-Mobile Gathering, Inc. v. Edwards*, *supra*, the Temporary Emergency Court of Appeals held, in a case nearly identical to this, that:

> "*payment to the United States Treasury is not restitution*, in the true sense of the word, *or in the objectives of the Statute here involved.*
>
> * * * *
>
> Clear, however, is the fact that the sale of the overpriced oil *was made to determinable utilities* and other institutions along the Atlantic seaboard. (Emphasis supplied).
>
> * * * *
>
> Suffice it to note that the government has a *duty* to

> try to ascertain those overcharged, and refund them, with interest, from the restitution funds. (Emphasis by the Court).

669 F.2d, at 721, 723. Here, on virtually identical facts, a different panel of the same Court held "[t]here was no need for the district court in this action to attempt the impossible task of attempting to ascertain the damage sustained by individual consumers of petroleum products." NOJC App. A at A-98. The majority's attempt to distinguish *Citronelle-Mobile* is unpersuasive. *See id.*, (Becker, J. dissenting in part) at NOJC App. A at A-117, 122.

The majority opinion in the Court below is in direct conflict with that Court's *Citronelle* decision as well as the TECA decisions in *United States v. ProFootball Inc.*, 514 F.2d 1396 (TECA 1975); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (TECA) *cert. denied*, 419 U.S. 896 (1974); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972) *cert. denied*, 410 U.S. 928 (1973), and *United States v. Lieb*, 462 F.2d 1161 (TECA 1972).

The majority opinion is also in conflict with numerous Court of Appeals decisions imposing a duty on a court to order restitution to injured parties in analogous injunction cases. *See, e.g., Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212 (8th Cir. 1970), *cert. denied*, 402 U.S. 999 (1971); *State of Tennessee v. Dole, supra.*

It is appropriate that this Court resolve the conflicting decisions within TECA (and between TECA and the Sixth and Eighth Circuits) promptly. This case, involving nearly two billion dollars in overcharges and important Constitutional and statutory issues destined to arise in many cases now pending and in the future, is a proper case for this Honorable Court to resolve this serious conflict.

D. The District Court's Departure From The Accepted And Usual Course Of Judicial Proceedings Requires That The Petition For A Writ Of Certiorari Be Granted.

The impropriety of the District Court's rush to dispose of this matter is highlighted by the course of action adopted by another District Court faced with the identical restitutionary duty resulting from collection of a crude oil overcharge fund. In *In re DOE/Stripper Well Exemption, supra* Judge Theis denied a motion by the States for immediate distribution, referred the matter to the Office of Hearings and Appeals ("OHA"), an agency of the Department of Energy, for fact finding and noted that the action of the District Court here was "premature." Judge Theis stated that to award the restitutionary fund to the states prior to a fact finding hearing would be a "too-hurried retreat from the objective of restitution" imposed by statute and by TECA. *In re DOE/Stripper Well Exemption Litigation*, 578 F. Supp. at 595 (D. Kan. 1983).

In the *Stripper Well Litigation*, the OHA found that it was possible to make a determination of the injury caused by the overcharge and concluded, that refiners absorbed between 2.7 and 8.1 percent of the overcharge, and passed the remainder (91.9 to 97.3 percent) through to direct purchasers such as "utilities". OHA Report, June 1985, NOJC App. C at A-381-382.

The District Court here had an equitable and statutory duty to attempt to ascertain the victims of the overcharge. Where PECO has been afforded an opportunity to be heard, it has established its claim. The appearance of judicial propriety requires that the District Court here fulfill its duty. The lower court's hasty judgment should be set aside and the matter remanded for further proceedings.

CONCLUSION

For all the foregoing reasons, PECO respectfully requests the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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September 14, 1985